U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: SEPTEMBER 14, 1988
CASE NO. 88-INA-77

IN THE MATTER OF

THE STANDARD OIL COMPANY
Employer

on behalf of

ROSARIO DEL PILAR NEIRA-CUELLAR
Alien

Appearance

Ethan Kaufman, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, DeGregorio, Fath, Levin, and Tureck,
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer

to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Standard Oil Company hired the alien, Rosario Del Pilar Neira-Cuellar, in April 1984, as a Research Chemist, the position for which certification is sought. In July 1986, the Employer filed a labor certification application on behalf of the Alien, and listed the job duties as follows:

> Plans, directs, and carries out research to identify and solve problems affecting productivity of oil wells. Such problems include damage to the reservoir rock and scale formation within the wellbore. Experiments aimed at remedying and preventing such occurrences are carried out at high pressure and temperature in the laboratory. Formulates and evaluates surfacants and other chemical solutions for their potential as agents for enhanced oil recovery. Works with field personnel to collect data and to test and apply solutions devised in the laboratory (AF 25).

As prerequisites, the Employer required a Ph.D. with a major field of study in organometallic chemistry and six months' experience as an analytical statistician. In addition, it listed as special requirements:

> Through dissertation work or job-related experience, demonstrate ability to 1) handle air sensitive materials; 2) perform the following chemical analytical techniques: Scanning Electron microscopy, Raman spectroscopy, Infared spectroscopy, Nuclear Magnetic Resonance, Ultraviolet and Visible Light spectroscopy, X-ray crystal diffractometry, Electron spin resonance, conductivity and magnetic susceptibility, and interfacial tension measurement; and 3) perform statistical analysis on industrial problems and laboratory experiments. Show evidence of application to characterization and synthesis of organometallic and inorganic compounds through publications or patents (AF 25).

The job opportunity was advertised in the December 22, 1986 issue of the Chemical and Engineering News and on the premises of the job location from December 17, 1986, through January 2, 1987 (AF 48,49). A job order was also submitted to the Ohio Bureau of Employment Services (AF 47). On February 4, 1987, the Employer informed the State Agency that it had rejected all 19 applicants on the basis of their resumes (AF 49). In a March 17, 1987 letter to the State Agency, the Employer said that three additional candidates applied, and that all were unqualified (AF 157).

In his Notice of Findings, dated June 1, 1987 (AF 11-16), the Certifying Officer (C.O.) denied certification. Relying on the State Agency's determination that six of the seven applicants who met the education requirement were not qualified for three specific job requirements, the C.O. said, "It appears that the job requirements have been tailored to the qualifications of the alien, and that the employer has not stated the minimum requirements for satisfactorily performing the job" (AF 14). The C.O. also said that the Employer must re-advertise, listing the educational requirement as a "Ph.D. in Chemistry with emphasis in Organometallic Chemistry", instead of as a "Ph.D. in the field of Organometallic Chemistry" (Id.).

As directed by the C.O., the Employer filed an amended application form, changing the educational requirement. The Employer also altered the job requirements slightly (AF 7-9). After re-advertising, the Employer reported the results of its second recruitment effort in a September 28, 1987 letter, which the Employer apparently intended to serve as its Rebuttal as well as an attempt to cure the deficiencies of its original application (AF 182-192). Of the 25 applicants who responded to its second recruitment effort, the Employer selected three candidates to interview, all of whom it had rejected as unqualified during the first recruitment effort. The Employer again rejected two candidates as unqualified and reported that the third was no longer interested in the position. It then selected one more candidate to interview and determined that he also was unqualified (AF 190-191). In addition to a detailed explanation of why it found all of the applicants unqualified, the Employer addressed the three job requirements found restrictive by the Ohio Bureau of Employment Services. It had deleted the Raman Spectroscopy requirement, but explained in detail why the successful applicant must be familiar with scanning electron microscopy and interfacial tension measurement (AF 182-192).

In his October 15, 1987 Final Determination (AF 4-6), the C.O. again denied certification. He said that the Employer had made only minor changes in the application and that the requirements were still unduly restrictive and tailored to the Alien's qualifications (AF 5-6). In addition, the C.O. said that apparently qualified applicants were not considered because they did not have what the C.O. considered to be unduly restrictive requirements that had been tailored to the Alien's qualifications (AF 5). The C.O. determined that the Employer had not documented why one candidate, who was no longer interested in the position at the time of the second recruitment effort, had been rejected initially (AF 6). The C.O. cited sections 656.20(c)(8), 656.21(b)(7), 656.21(j), and 656.21(b)(6) as the applicable regulations (AF 5).

The Employer requested review on December 1, 1987, and filed a supporting brief on January 29, 1988. No brief was submitted on behalf of the C.O.

Discussion

In his Notice of Findings (AF 11-16), the C.O. quoted extensively from the Ohio Bureau of Employment evaluation and said that he agreed with that determination (AF 14). The State Agency had acknowledged that, because of the complex job requirements, it was unable to determine, by reviewing the applicants' resumes, whether they were qualified (AF 13). It explained that it had sent questionnaires to 13 of the 22 applicants who had sent resumes during the first recruitment effort; of the eleven who responded, seven stated that they possessed the

required degree, but none satisfied all of the job requirements listed in item 15 of 750A. Upon deciding that six of those seven applicants lacked three specific requirements, which are not listed in the Notice of Findings or apparently even in the original determination of the State Agency[1], the Agency concluded that those three requirements may be unduly restrictive (AF 14).

The C.O. agreed with the State Agency that those three specific requirements were unduly restrictive and concluded that, therefore, the job requirements had been tailored for the Alien and the Employer had not stated the minimum requirements for the job opportunity (Id.).

In his Final Determination (AF 4-6), the C.O. expanded his objections. Instead of investigating only the changes and arguments made during the second recruitment effort regarding the three cited requirements, the C.O. challenged all of the special requirements spelled out in ETA Form 750A, item 15 (AF 5-6). The C.O. concluded, with no more explanation than he had set out in his Notice of Findings, that the Employer "appears to continue to tailor his requirements to the qualifications of the selected alien employee" (AF 6). The C.O. added that one applicant, Dr. Poutasse, appeared qualified, but was rejected during the initial contact period, and was not interviewed during the second period because, according to the Employer, he was no longer interested (AF 190).

Normally the C.O. would be correct in identifying the determinative issue regarding Dr. Poutasse not as whether he was still available at the time of the second recruitment effort, but, rather, whether he had been lawfully rejected in the first place (AF 6). See In the Matter of ENY Textiles, Inc., 87-INA-641 (January 22, 1988). Examining his resume (AF 62), it is clear that Dr. Poutasse had the required degree and that he satisfied many of the Employer's specific job requirements. As the Employer noted, however, Dr. Poutasse lacked experience in electron spin resonance and interfacial tension measurement, techniques deemed crucial by the Employer (AF 55,62). Moreover, rather than finding, in his Notice of Findings, that Dr. Poutasse was improperly rejected the first time, the C.O. oddly changed the relevant time-frame of recruitment, and therefore of availability, by directing the Employer to re-advertise, rather than insisting on a justification for the initial rejection of Dr. Poutasse.

The problem in this case is that the C.O. has not made clear, either in the Notice of Findings or in the Final Determination, the reasons for his denial. In the Notice of Findings, the C.O. described the certification process and told the Employer to re-advertise, with an amended educational requirement, as described above (AF 14). Oddly enough, the C.O. did not address whether, in his opinion, any of the 19 rejected candidates were qualified, nor did he tell the Employer to reassess those candidates (Id.). In fact, it is not clear whether the C.O. examined the credentials of the rejected applicants.

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[1] The Employer's brief of January 29, 1988, p.4, refers to a letter dated July 7, 1987, from the Chief of the Alien Certification Program, Ohio Bureau of Employment Services, identifying the three specific job requirements as Scanning electron microscopy, Raman spectroscopy, and Interfacial tension measurements.

It is the C.O.'s obligation, under the regulations, to state the specific bases upon which the decision to issue the Notice of Findings was made. 20 C.F.R. §656.25(c)(2). If the reasons for the denial are not made clear to the Employer, it cannot rebut with specificity nor can it attempt to cure any deficiency, both of which are crucial to the Employer, as all findings in the Notice of Findings that are not rebutted are deemed admitted under section 656.25(e)(3).

The Employer points out that the Ohio Bureau of Employment Services decided that the three above-mentioned requirements were unduly restrictive, even though the Agency admitted that it did not understand the highly technical and complex position requirements (Employer's Brief, p.6; See AF 13-14). Furthermore, in the Notice of Findings, the C.O. merely adopted the State Agency's conclusions, with no explanation as to why he considered the requirements unduly restrictive (AF 14). We realize that it is the Employer's burden to document that the job opportunity has been described without unduly restrictive requirements, pursuant to section 656.21(b)(2). We also realize that the Dictionary of Occupational Titles (DOT) description of a chemist (Occupational Code No. 022.061-010) is very general, providing only a few examples of the types of techniques employed, and that the specific techniques used by a given chemist will vary according to the chemist's specialty. However, it is not enough for the C.O. simply to say that, while he does not understand the job opportunity, the requirements are unduly restrictive (AF 13-14).

In the Notice of Findings, the C.O. made a determination that three specific requirements were unduly restrictive (Id.). In response, the Employer provided a reasonable explanation of why the remaining two requirements were necessary for the satisfactory performance of the job in question (AF 191-192). If, after this rebuttal, the C.O. decided that there were additional reasons for denying certification, the C.O. had the obligation to issue a new Notice of Findings. See HMS Investments, Inc., 87-INA-684 (February 3, 1988). Instead, the C.O. issued his Final Determination, in which it does not appear that he considered the Employer's rebuttal, as required by section 656.25(f). As noted above, the C.O. said that the Employer only rearranged his requirements (AF 5). Moreover, instead of addressing the Employer's attempt to justify the remaining two of the three specific requirements challenged in the Notice of Findings, the C.O. expanded his objections in the Final Determination to include the three broad areas of special requirements that the Employer had listed in its original application (Id.; See AF 25). To the extent that the denial of certification was based on grounds not previously specified in the Notice of Findings, it cannot stand. Section 656.25(c).

The reasons given by the C.O. for his denial of labor certification are not clear. Moreover, he appears not to have reviewed the evidence submitted by the Employer on rebuttal. Rather than analyzing this matter clearly, and considering the Employer's rebuttal to the defects set forth in the Notice of Findings, including a reasonable explanation by the Employer of the two requirements originally found restrictive, the C.O. issued an improper and confusing Final Determination and then forwarded the file to us in a confusing posture. For these reasons, and because of the extensive history in this case, including two recruitments by the Employer at the request of the C.O. and ample opportunity for the C.O. to specify supportable reasons for denying certification, we reverse the C.O.'s decision and grant labor certification.

ORDER

The Final Determination of the Certifying Officer denying certification is REVERSED and the application for labor certification is hereby GRANTED.

For the Board:

Lawrence Brenner
Administrative Law Judge

LB/JF/gaf

In the Matter of STANDARD OIL COMPANY, 88-NA-77
Chief Judge NAHUM LITT, concurring,

While I concur with the majority, that the certifying officer's denial of certification should be reversed, and that the application for labor certification should be granted, I express my reservation, that the majority has not specifically determined whether the requirements in this particular case are unduly restrictive.

NAHUM LITT
Chief Judge

NL:AS

Stuart A. Levin, Administrative Law Judge - Dissenting
George A. Fath, Administrative Law Judge concurring in the Dissent

This proceeding highlights a noteworthy development in the Board's labor certification policy agenda. While the Board finds the file in this matter "confusing" and is unable to resolve the issues presented on the merits, it, nevertheless, grants certification as a sanction to signal its displeasure with the Certifying Officer. Yet, the public interest is not well served when the Board bickers in this way with a Certifying Officer. Nor do such circumstances justify the imposition of a penalty contemplated neither by the Statute nor the regulations. Indeed, it is not the Certifying Officer who is disadvantaged by the Board's action, but U.S. workers who are denied opportunities the certification program was designed to secure. See generally, Saxbe v. Bustos, 419 U.S. 68, 69 (1974); Pesikoff v. Secretary of Labor, 501 F.2d 757, 761 (D.C. Cir., 1974) cert. denied 419 U.S. 1038.

In this instance, the Board is critical of the Certifying Officer for failing to find that any of the U.S. workers were qualified. The Board, of course, has the entire record before it. Yet, it, too, fails to evaluate the qualifications or "examine the credentials of the rejected applicants." If, as the majority observes, the Certifying Officer's determination was deficient in these respects, the Board's decision suffers precisely the same deficiencies. As a consequence, the Board grants

certification without the requisite finding that the U.S. applicants were unqualified for the job. See, Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14); and 20 CFR §656.2(e); Oriental Rug Importers, Ltd. v. E.T.A., 696 F.2d 46, 48 (6th Cir., 1984); Doraiswamy v. Secretary of Labor, 555 F.2d 832, 847 (D.C. Cir., 1976).[1]

The Board next comments briefly about the job requirements which the Certifying Officer found unduly restrictive. The Certifying Officer identified scanning electron microscopy and interfacial tension management as job requirements regarded as unduly restrictive. Beyond a passing observation that the employer submitted a "reasonable explanation" of these requirements, the majority fails to undertake its own analysis of the job requirements or the employer's explanation, and carefully avoids concluding, either specifically or implicitly, that the requirements are not unduly restrictive. It must, therefore, be emphasized that the Board is not, on this record, finding the employer's "reasonable explanation" sufficient to constitute prima facie justification for two of the job requirements, and the majority does not contend otherwise.[2] Thus, the employer has been unable to satisfy its obligation to document and explain with sufficient clarity to establish, at least a prima facie case, that two of its requirements are justified. This alone may be a "supportable" reason for the Certifying Officer to deny certification, but it clearly is not sufficient to permit the Board to grant certification as it does here. See, Kwan v. Donovan, 777 F.2d 479 (9th Cir. 1985); Oriental Rug Importers, supra at 49; Doraiswamy, supra;

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[1] The above text tracks the majority decision which is organized to address the U.S. workers' qualifications before reviewing the job requirements. This organization of the issues, however, tends to confuse matters since it would seem to make sense to evaluate the job requirements first and then screen the U.S. workers against the lawful job requirements. In reversing the process, the Board should provide guidance in respect to whether it expects Certifying Officers to evaluate U.S. workers in light of the job requirements the Certifying Officers consider appropriate, or the unduly restrictive requirements, or both. In this instance, for example, two of the job requirements may be unduly restrictive, but the Board fails to indicate whether U.S. workers must nevertheless be able to satisfy those requirements.

A related issue left unanswered by majority's approach is how the Board wishes Certifying Officers to factor in the actual and potential deterent impact of unduly restrictive job requirements on potentially qualified U.S. workers who do not apply for a job believing they must but cannot satisfy such requirements.

[2] It may also be noted that the Board's decision is silent in respect to the factors, reasons, or rationale which leads it to the judgmental conclusion that the employer's explanation is reasonable in the context of this application. This silence is significant since it is difficult to imagine how decisional consistency can be maintained, and guidance provided if the Board declines to communicate to the parties and the public some insight into the rationale and grounds upon which its conclusion is predicated. As the District Court noted in another context which is equally applicable here, agencies have due process responsibilities to render informative decisions with findings and reasons for their conclusions to "offer a degree of protection from unrestrained and unwarranted bureaucratic action." Bell Lines, Inc. v. U.S., 263 F. Supp. 40 (W.D. W. VA., 1967).

Acupuncture Center of Washington v. Dunlop, 543 F.2d 852, 859-860, D.C. Cir., (1976) cert. denied 429 U.S. 818; Silva v. Secretary of Labor, 518 F.2d 301, 309-10 (1st Cir., 1975); Pesikoff v. Secretary of Labor, 501 F.2d 757, 761 (D.C. Cir., 1974) cert denied, 419 U.S. 1038. 20 CFR §656.2(b).

As previously mentioned, the Board has the entire record before it. If the Certifying Officer erred in finding the requirements unduly restrictive, the Board should so state and provide its rationale in the public interest. If the requirements are unduly restrictive, the denial of certification should be affirmed. If the record is not sufficient to permit the Board to render a decision on this complex issue, which appears to be the situation here, the Board should either remand the matter with specific instructions for further factfinding pursuant to 20 CFR §656.27(c)(3) or conduct a hearing pursuant to 20 CFR §656.27(f). What is not an acceptable alternative, however, is the path the Board has chosen.[3]

As a review of the majority decision plainly reveals, the grant of certification here has little to do with either the merits of the U.S. workers' qualifications or the employer's justification for requiring experience in electron scanning microscopy and interfacial tension management. Rather, the Board is moving in the direction not of guiding, but of micro-managing the Certifying Officers. As such, the majority's considerable analytical energies are channeled away from the merits of the issues, and refocused upon the Certifying Officer for failing to provide answers to complex issues which the Board itself, on the same record, is equally incapable of resolving.

There is, of course, a further weakness in the Board's agenda. The majority is, as a matter of policy, prepared, without further inquiry, affirmatively to certify to the Attorney General and

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[3] Citing the fact that it is confused by the record, "and because of the extensive history in this case, including two recruitments by the employer at the request of the C.O.," the Board reverses and grants certification. There is, however, no evidence of undue delay or footdragging by any public official or party to this proceeding.

The majority is correct that the history includes two recruitments. The first recruitment, however, was not requested by the Certifying Officer. Rather, it was the threshold recruitment prerequisite to certification required by the regulations. The second recruitment was necessitated by amendments to the position requirements, including an alteration in the description of the education required, and the deletion of special requirements regarding Raman Spectroscopy, Infrared Spectroscopy, and Ultraviolet and Visible Light Spectroscopy. (See, Employer's Brief at 5-6). Time expended in resolving such problems would seem neither wasteful, untoward, nor cause for just criticism.

As recently noted in a similar context, care must be taken that the policy agenda implemented by the Board does not affirmatively seek to discourage thorough inquiries by the Certifying Officers. See, Phototake, 87-INA-667 (July 20, 1988) dissent at fn 1. In the matter before us, the administrative history should not deter the Board from further investigation and factfinding in the public interest.

the Secretary of State that qualified U.S. workers are not available to this employer knowing that nearly four dozen applications for the job were filed by U.S. workers and were rejected by the employer using criteria which may be unduly restrictive. Other interested, and potentially qualified workers may have simply been discouraged by the challenged requirements from applying for the job.

Under circumstances in which such questions remain open, it is difficult to ascertain the rationale upon which the Board roots the representation, inherent in its statutory certification, that qualified workers were not available and that the U.S. workers who did apply were unqualified for the job. Certainly, nothing in the majority decision reveals an understanding of the job requirements, the U.S. applicants' qualifications, or the record facts sufficient to support such a conclusion. The Board, in granting certification without regard for the accuracy of the fact representations upon which certification must be predicated, misuses, to the detriment of U.S. workers, the limited delegation of authority conferred upon it to implement the law. Section 212(a)(14), Immigration and Nationality Act, 8 USC §1182(a)(14).

STUART A. LEVIN
Administrative Law Judge and
Member of the Board

I concur:

GEORGE A. FATH
Administrative Law Judge and
Member of the Board